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No. 94-1722

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JULIA SAAVEDRA BALMACEDA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AS *AMICI CURIAE* OF THE DELAWARE RIVER PORT AUTHORITY AND THE PORT OF PHILADELPHIA AND CAMDEN, INC.

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QUESTION PRESENTED

Was the majority of the in banc Court of Appeals for the Third Circuit (by a 7-6 vote) correct in affirming the dismissal of complaints filed by Chilean businesses under the Federal Tort Claims Act for harm caused by the non-discretionary conduct of government laboratory technicians in negligently testing and falsely reporting the presence of cyanide in Chilean fruit, when, contrary to the allegations of the complaints and in the absence of a record, the Third Circuit majority based its affirmance on a characterization of the complaints as seeking damages caused by discretionary governmental actions occurring subsequent to the negligent laboratory testing?

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Amici Curiae, the Delaware River Port Authority ("DRPA") and The Port of Philadelphia and Camden, Inc. ("PPC"), submit this brief in support of the pending Petition for Writ of Certiorari in the above-captioned appeal.[1]

DESCRIPTION OF *AMICI CURIAE*

The DRPA is a public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey created by Compact entered into between Pennsylvania and New Jersey and approved by the United States Congress.

1. DRPA and PPC obtained the consent of all Petitioners and the consent of the Respondent, the United States of America, to file this brief. Evidence of such consent has been filed with the Clerk of the Court.

Among the powers granted to the DRPA by the Compact is the power to effect the unification of the ports of the Delaware River. Another specifically granted power is to promote the use of the Delaware River as a highway of commerce, including the promotion of passenger and freight commerce on the river. Consistent with these powers, the DRPA created PPC as a subsidiary in 1994. The DRPA port district includes Philadelphia, Pennsylvania and its four surrounding counties and Camden, New Jersey and seven other Southern New Jersey counties. Although PPC is specifically responsible for port related issues including commerce, the DRPA retains the general power to operate in this area also.

DRPA is governed by sixteen commissioners—six appointed by the Governor of Pennsylvania (two sitting as ex-officio commissioners as a result of their election to office in Pennsylvania) and eight appointed by the Governor of New Jersey with the consent of the New Jersey Senate. PPC is governed by eighteen directors—four appointed by the governor of Pennsylvania, four appointed by the Pennsylvania Legislature, one appointed from the Pennsylvania delegation to the DRPA Commission, and nine appointed by the Governor of New Jersey with the consent of the New Jersey Senate.

Oversight of international imports and exports at the port facilities within the DRPA's port district is predominately within the control of PPC. As part of the unification effort, the World Trade Division of DRPA (the "WTD") has been transferred to PPC. The WTD has monitored the importation of Chilean fruit since that fruit was first handled in the ports of Philadelphia and Camden in 1984. Chilean fruit quickly emerged as one of the most significant commodities handled in these ports, and it remains one of their most significant commodities to this date.

INTEREST OF *AMICI CURIAE*

Fresh fruit from Chile has, for over a decade, been one of the most significant commodities handled at the port facilities of Philadelphia and Camden. The Chilean Grape Crisis of 1989, which resulted in a multi-week embargo of Chilean fruit

during the height of the 1988-1989 fruit season, has been the most disruptive event connected with the importation of Chilean fruit since that fruit first came to Philadelphia and Camden. The effects of the crisis were devastating to entities involved at every level of the Chilean fruit trade—predominantly growers, exporters and importers of Chilean fruit. The embargo, and subsequent import restrictions, which were in effect from March to April of 1989, occurred during the height of the import season and resulted in the destruction of approximately 6,200,000 cases of fruit and the exclusion of millions more cases of Chilean fruit. The embargo and the destruction of fruit were the result of the purported finding of cyanide in two grape berries delivered to Philadelphia from Chile, which had been tested for contamination in the Philadelphia laboratory of the Food and Drug Administration (the "FDA").

Approximately 2,400 growers, exporters and importers of Chilean fruit have brought claims against the United States seeking money damages for losses incurred as a result of negligence on the part of the FDA in its laboratory testing of Chilean fruit. Those claims are founded upon the United States waiver of sovereign immunity contained in the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (the "Tort Claims Act" or the "Act"), for losses caused by the negligence of United States employees. In the cases brought by the Chilean entities, they have alleged negligence on the part of FDA laboratory technicians in testing the two grape berries and reporting a positive finding of cyanide contamination. All claims brought under the FTCA have been dismissed pursuant to the discretionary function exception, 28 U.S.C. § 2680(a), and those dismissals have been affirmed by the in banc Third Circuit Court of Appeals by a 7 to 6 vote. *Fisher Bros. Sales, Inc., et al. v. United States,* 46 F.3d 279 (3d Cir. 1995), Pet. App. 1a-24a. As a result of the divided Third Circuit's ruling, there has been no merits-based review of the claim that FDA negligence resulted in the mistaken report of cyanide contamination in Chilean fruit. No compensation has been paid by the United States to any entity which incurred losses as a result of the 1989 embargo.

DRPA and PPC have filed this brief as *Amici Curiae* because of their strong interest in assuring that businesses using the port facilities of Philadelphia and Camden receive a full and fair opportunity to present for review to the United States courts legitimate claims for harm caused by government negligence in the regulation of trade. DRPA and PPC support the right of the Chilean businesses to present claims for damages caused by the non-discretionary negligence of United States employees in testing imported Chilean fruit for contamination, and to have a fair review of the merits of these claims within the judicial system of the United States.

The interest of *Amici Curiae* can be best understood from basic data on the importance of Philadelphia and Camden as ports of entry for Chilean fruit and on the corresponding importance of Chilean fruit traffic to the economies of Philadelphia and Camden. Philadelphia and Camden are the significant ports of entry for fruit and vegetables in the North Atlantic. Their share of the North Atlantic importation of fruits and vegetables has risen from approximately 12% in 1984 to approximately 33% ten years later. *See Amici Curiae* Appendix ("Am. App.") at 1a. By 1992-1993, fruits and vegetables made up 20-25% of the total import tonnage of general cargo to the ports of Southeastern Pennsylvania and Southern New Jersey. Am. App. at 2a.[2] During the ten year period 1984-1993, the Chilean share of North Atlantic imports of fruits and vegetables grew from 31% to 50% of the totals. Am. App. at 3a. The major share of the Chilean fruit imported to the North Atlantic has been handled at the ports in Philadelphia and Camden, and that share has ranged from a high of 98% in 1984 to a low of 70% in 1993. Am. App. at 4a and 5a.

The interest of DRPA and PPC is also reflected in the positive economic impact upon Philadelphia and Camden (and their surrounding regions) by the presence of Chilean fruit traffic at the local port facilities. The WTD has calculated the number of cases of Chilean fruit handled at the local ports from the 1986-87 season to the 1992-93 season as follows:

---

2. General cargo excludes "bulk" cargo, which is predominantly composed of petroleum products and metal ores.

Import Season	Cases Handled
1986-87	27,176,250
1987-88	32,058,412
1988-89	30,364,190
1989-90	37,686,368
1990-91	31,606,093
1991-92	33,541,546
1992-93	32,425,000

From these numbers, WTD approximates the economic impact of the Chilean fruit traffic by calculating direct economic transactions (stevedoring wages, dockage and wharfage income, pilot and tug services, fumigation services and importer mark-up) and by calculating a total economic impact by using a multiplier of 1.5. Using this methodology, WTD approximated the direct and total economic impact for three recent seasons as follows:

Import Season	Direct Economic Impact	Total Economic Impact
1986-87	$45,780,000	$114,450,000
1988-89	$47,211,000	$118,027,500
1992-93	$54,159,000	$135,398,000

Given the enormous impact of the Chilean fruit trade to the Philadelphia-Camden region, DRPA and PPC monitor any events that could disrupt the flow of that commodity to the United States generally. The Chilean Grape Crisis of 1989 has been the most significant event in the course of the trade since Chilean fruit came to Philadelphia in 1984. Growers, importers and exporters seek damages in excess of $210 million as a result of the crisis. The concern of DRPA and PPC is that to date, now more than six years after the event, entities damaged by the negligence of the FDA laboratory have been unable to obtain a merits-based review of their claim that their damages were caused by the non-discretionary negligence of United States employees. Because the in banc Third Circuit has dismissed the complaints in the absence of any record, the claimants have been unable to present any evidence in support of their well-pleaded claims that laboratory negligence resulted in the incorrect finding and reporting of the presence of cyanide in two grape berries unloaded at the Port of Philadelphia in March 1989.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE CONSTRUED TO PREVENT A MERITS-BASED REVIEW OF A CLAIM ALLEGING NEGLIGENCE IN FDA LABORATORY TESTING.

As a major import center for fruit and vegetables from foreign countries, the ports of Philadelphia and Camden work closely with FDA officials, whose responsibilities include enforcement of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-394 (the "FDCA"). As part of that statutory scheme, the FDA may engage in the inspection and testing of fruit imported for domestic consumption. Indeed, those are the precise acts at issue in the cases at hand.

The acts of inspecting and testing fruit are important ones, which affect vast amounts of commerce. By operation of the Tort Claims Act, those acts, as conducted by United States employees, may form the basis of a claim for money damages if the acts are performed negligently and the negligence causes harm. 28 U.S.C. § 1346(b). Some of these inspecting and testing activities do not meet the criteria for application of the discretionary functionary exception to the Tort Claims Act. 28 U.S.C. § 2680(a). *See Berkovitz v. United States,* 486 U.S. 531, 536 (1988). Specifically, because some of the FDA's conduct in connection with incoming fruit and vegetables are purely mechanical, scientific or technical in nature, those acts are not discretionary. *See, e.g., Ayala v. United States,* 980 F.2d 1342, 1349-50 (10th Cir. 1992); *Andrulonis v. United States,* 952 F.2d 652, 654-55 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 2992 (1992); *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1031 (9th Cir. 1989); *Alabama Elec. Corp., Inc. v. United States,* 769 F.2d 1523, 1531 (11th Cir. 1985).

The decision of the in banc majority of the Third Circuit in the cases at hand has effectively immunized the non-discretionary scientific or technical conduct of the FDA from liability under the Tort Claims Act. Under the Third Circuit's ruling, FDA laboratory technicians may, without judicial review, negligently administer standard laboratory tests and

erroneously report findings of contamination in imported fruits and vegetables, thereby leading to the mass destruction of those products. This harm will go unreviewed and uncompensated if some arguably discretionary decision is made subsequent to the negligent, non-discretionary testing. Such a result effectively nullifies Congress' waiver of sovereign immunity for negligent conduct reflected in the Tort Claims Act. The result is also contrary to this Court's holding in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), requiring that once undertaken, non-discretionary acts of United States employees must be conducted in a non-negligent manner.

II. THE ISSUES RAISED BY THE PETITION INVOLVE MATTERS OF SIGNIFICANT INTERNATIONAL CONCERN AND SHOULD BE RESOLVED BY THIS COURT.

DRPA and PPC have reviewed the Petition for Writ of Certiorari and respectfully request that this Court issue the Writ. Of most significant concern to the DPRA and PPC is the importance of the issue raised to international trade with Chile, and indeed with all other trading partners of the United States that utilize the ports of Philadelphia and Camden.

Two basic principles of international trade have been compromised by the rulings of the district court and the Third Circuit majority in this case. First, the inspection and review procedures applied by government agencies to international trade should be open and rational, not secret and arbitrary. The principle of "transparency" has received increased importance in international trade. *See* H. Doc. 103-316, v. 1, Uruguay Round Trade Agreements, at p. 59, § 126 (instructing United States Trade Representative to "seek . . . broader application of the principle of transparency"). Second, if there are legitimate disputes regarding the inspection and review procedures applied by a government agency, there should be some reasonable procedure for the adjudication of such disputes. This principle has been codified most recently in the North American Free Trade Agreement ("NAFTA"), to which Chile may be, ironically, the next country to accede. *See* NAFTA Art. 1804 (mandating that country parties afford other parties "a reasonable opportunity to present facts and

arguments prior to any final administrative action"). Here, in contravention of these basic principles, the negligence of the FDA's Philadelphia laboratory has been insulated from scrutiny, and the Plaintiffs have been precluded from having any merits-based review of their claims within the judicial system of the United States.

The split between the Third Circuit in these cases and the Eighth Circuit in *Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993), raises further concerns about the incorrectness of the Third Circuit's ruling with respect to international trade. The Eighth Circuit has permitted a merits-based review of claims of negligent government inspection with respect to domestic commerce—negligent inspection of grain stored by United States agricultural interests in a domestic grain storage facility. The Third Circuit majority, in contrast, has prohibited a merits-based review of claims of negligent government inspection with respect to international commerce— negligent government inspection of Chilean fruit imported into the Philadelphia port facility. This differential treatment of domestic and foreign commerce subject to government inspection raises concerns about the basic fairness of the United States procedures for addressing disputes regarding the inspection of international commerce.

In these cases, international businesses damaged by the FDA's embargo have been told, in essence, that employees of the United States are at liberty to commit negligence, and that well-pleaded allegations of non-discretionary negligence will not even be heard on the merits by the courts of the United States. DRPA and PPC agree with the Petitioners that the Third Circuit's ruling in these cases is incorrect. At the very least, these cases should be reviewed by this Court.

CONCLUSION

DRPA and PPC respectfully request this Court to issue a Writ of Certiorari in these cases.

Respectfully submitted,

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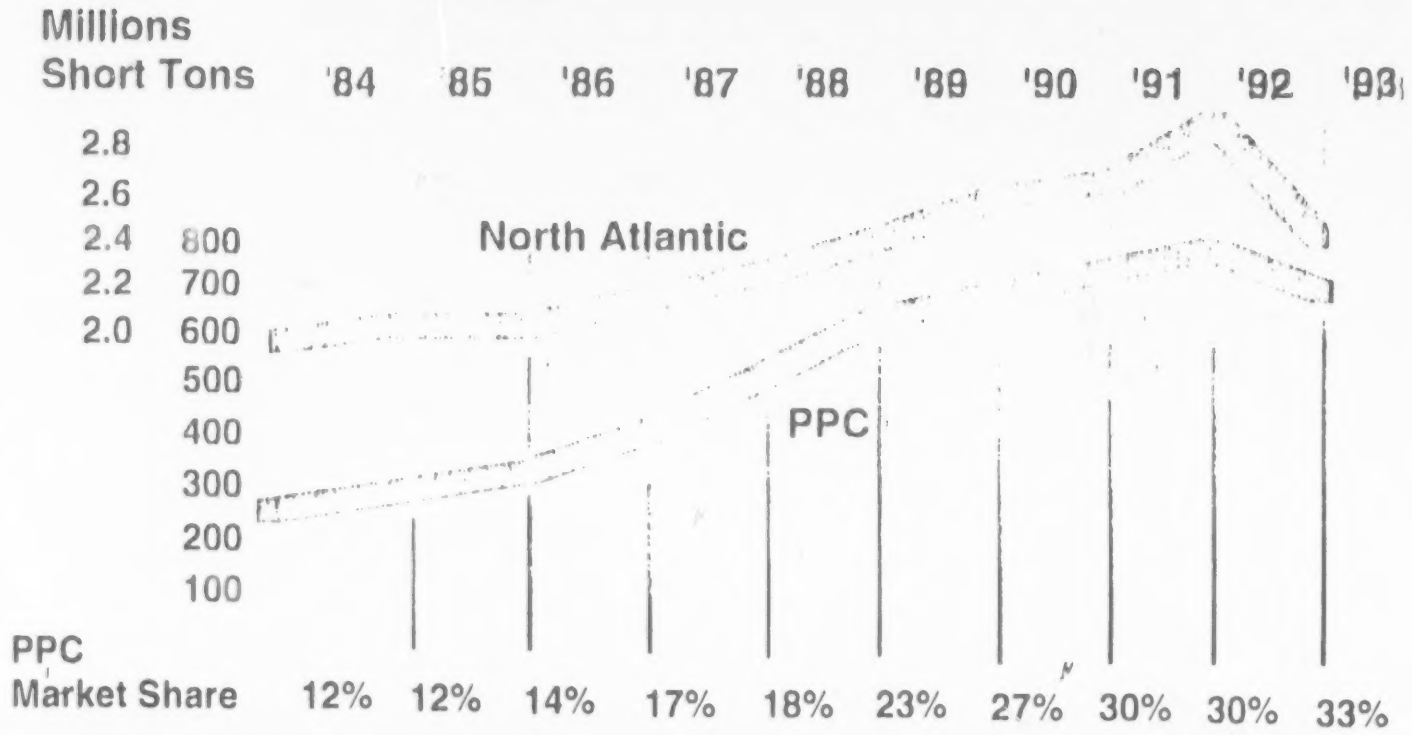
Dated: May 22, 1995

APPENDIX

The Port of **Philadelphia and Camden**

North Atlantic Ports / PPC
Imports of Fresh Fruits and Vegetables
1984-1993



IMPORTS

THE PORTS OF PHILADELPHIA AND CAMDEN ***
PRELIMINARY
INTERNATIONAL WATERBORNE COMMERCE
CALENDAR YEAR 1992 VS 1993
(IN SHORT TONS)

	STONS CY 1992	$ 000 CY 1992	STONS CY 1993	$ 000 CY 1993	STONS CHANGE	STONS % CHANGE
TOTAL CARGO	55,723,410	10,335,817	60,989,653	10,239,307	5,266,243	9%
BULK CARGO	51,727,807	5,987,262	56,701,560	5,805,448	4,973,753	10%
GENERAL CARGO	3,995,603	4,348,555	4,288,093	4,433,864	292,490	7%
BULK CARGO						
PETROLEUM & PETROLEUM PRODS *	47,645,987	5,777,290	51,634,218	5,552,461	3,988,231	8%
METAL ORES AND SCRAP	3,078,122	125,131	3,672,236	152,119	594,114	19%
FERTILIZERS CRUDE AND MINERALS	758,727	12,118	987,006	19,857	228,279	30%
COAL AND COKE	107,924	3,603	143,903	4,748	35,979	33%
GAS NATURAL AND MANUFACTURED	36,822	3,966	112,254	10,325	75,432	205%
FERTILIZERS AND MATERIALS	41,964	5,253	98,211	9,972	56,227	134%
ALL OTHER BULK CARGO	58,241	59,879	53,732	55,961	(4,509)	-8%
GENERAL CARGO						
FRUITS AND VEGETABLES	925,014	516,644	859,533	408,434	(65,481)	-7%
PAPER AND PAPERBOARD	437,822	294,700	761,120	482,365	323,298	74%
CHEMICALS **	606,303	478,969	704,647	474,240	98,344	16%
IRON AND STEEL	688,499	447,102	606,797	381,174	(81,702)	-12%
MEAT AND MEAT PREPARATIONS	340,108	716,714	332,507	778,247	(7,601)	-2%
PLYWOOD, WOOD/CORK MFRS.	250,939	183,963	250,868	186,080	(71)	-0%
COCOA, COFFEE AND TEA	165,424	201,501	213,749	226,456	48,325	29%
PULP AND WASTE PAPER	138,356	56,234	109,938	25,379	(28,418)	-21%
LUMBER, WOOD AND CORK	55,169	21,332	75,268	30,101	20,099	36%
BEVERAGES	50,027	53,300	44,435	37,350	(5,592)	-11%
ALL OTHER GENERAL CARGO	335,942	1,398,076	329,231	1,404,038	(6,711)	-2%

* Oils, lubes, and greases are not separated from bulk
** Chemicals contain both bulk and general cargo
*** Comprised of ports in Southeastern Pennsylvania and Southern New Jersey

SOURCE: U.S. Department of Commerce, Bureau of the Census
JTS Associates
COMPILED BY: DRPA/WTD

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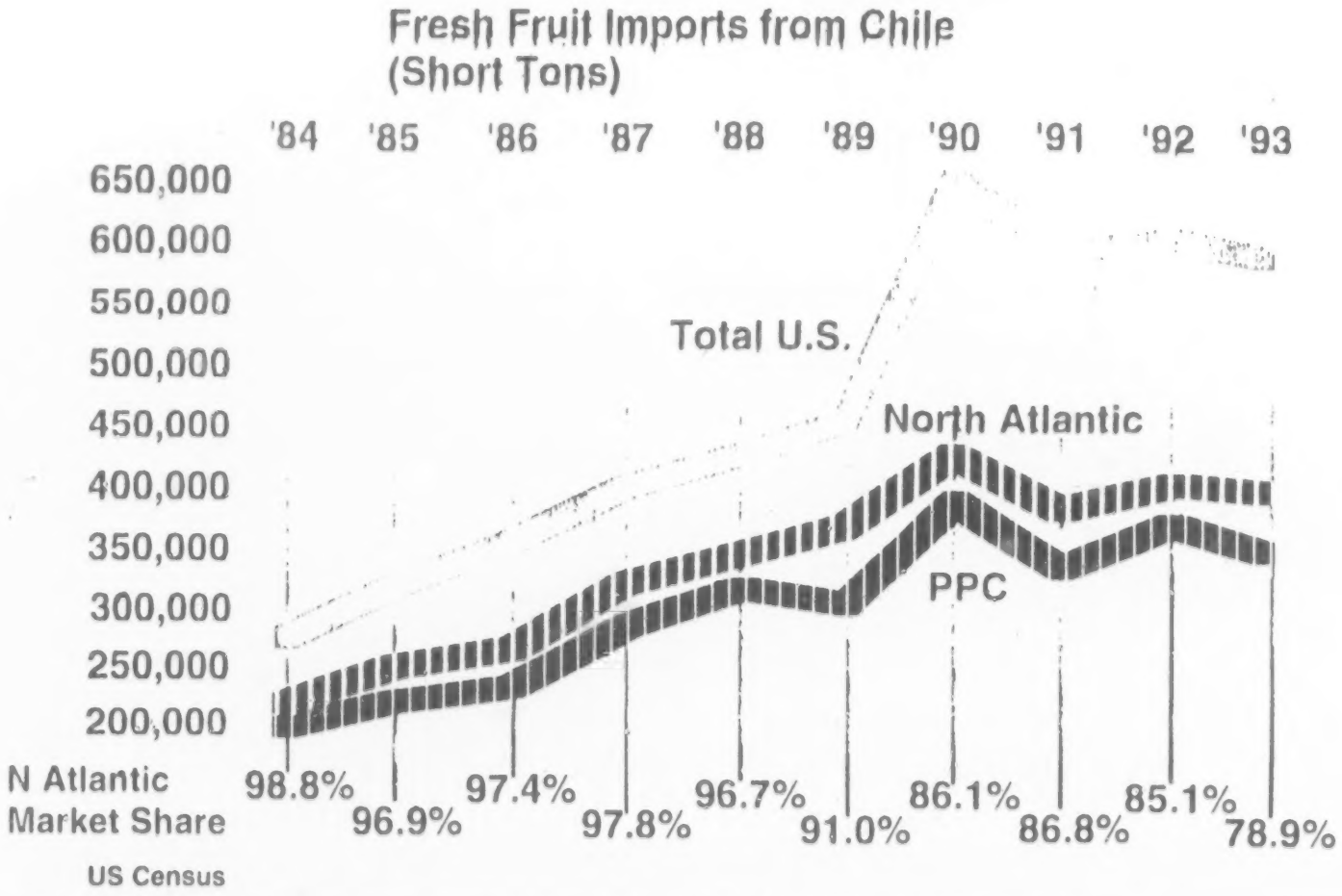
BEST AVAIL

The Port of Philadelphia and Camden

Imports of Fresh Fruit and Vegetables
North Atlantic Ports Marketshare
By Trade Route 1984-1993

	'84 %	'85 %	'86 %	'87 %	'88 %	'89 %	'90 %	'91 %	'92 %	'93 %	
CA / Carib	-	-	-	-	-	22	34	35	28	31	+31%
W Coast SA	31	30	32	39	39	34	34	37	45	50	+23%
Mediterranean	1	2	2	2	2	5	3	4	1	1	-37%
E Coast SA	3	5	14	20	45	31	25	32	29	27	+3875%
S East Asia	1	-	4	18	18	4	1	-	-	-	+13%
North Europe	5	16	16	3	9	8	6	3	1	1	-57%
Australia / NZ	9	17	74	17	14	11	11	16	16	33	+203%
China / Korea	6	4	3	1	3	5	1	-	-	-	-

The Port of **Philadelphia and Camden**



IMPORTS OF FRESH FRUITS & VEGETABLES (IN SHORT TONS)
DATA SOURCE: THE CENSUS BUREAU

FROM CHILE

	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
TOTAL U.S.	277,393	325,373	354,411	438,642	492,409	505,489	649,809	585,018	604,593	592,812
NORTH ATLANTIC	228,088	242,130	262,008	330,232	360,102	361,578	469,239	391,492	420,658	417,346
PHILADELPHIA	225,360	234,730	255,374	323,234	348,392	329,208	404,065	340,127	358,105	329,357

	1994	1995	1996	1997	1998	1999	2000
TOTAL U.S.	645,142	666,129	687,115	708,102	729,089	750,076	771,062
NORTH ATLANTIC	441,974	452,994	464,015	475,035	486,055	497,076	508,096
PHILADELPHIA	344,300	342,231	340,162	338,093	336,023	333,954	331,885